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COMMENTS FROM COUNSEL: SAFEWAY V NEWTON: A LIMITED LIFELINE FOR DEFEASIBLE BENEFITS?

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In this article, *Sebastian Allen* of Wilberforce Chambers considers the Court of Appeal's recent decision in *Safeway v Newton [2017] EWCA Civ 1482*, in which it held that *Harland & Wolff* had been wrongly decided and that the very issue for which *Harland & Wolff* had stood as authority for so long should be referred to the ECJ for determination. This article looks at the basis for the Court of Appeal's decision and asks whether this marks the beginning of a renaissance in failed equalisation cases, or whether it is a final flourish before the inevitable end.

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It might reasonably have been thought that by 2017 the long-running equalisation saga had finally drawn to a close.

The legal landscape of equalisation had become largely settled in the twenty-seven years since the seminal decision of the European Court of Justice (ECJ) in *Barber v Guardian Royal Exchange Assurance Group [1991] 1QB 344 (Case C-262/88)*. The steady stream of failed equalisation issues that used to occupy the desks of those in the pensions industry had receded significantly and there had been no new equalisation cases in the courts for some time.

An important milestone in that relative stability was the domestic law decision of Mr Justice Warren in *Harland & Wolff Pension Trustees Limited v Aon Consulting Financial Services Ltd [2006] EWHC 1778 (Ch)*.

That case has been relied upon for over ten years as authority for the proposition that EU law required that benefits accruing during the "Barber window", that is, between the date of the decision in *Barber* and the date on which "measures" were brought into force to bring about equalisation, had to be "levelled up" and could not be "levelled down", even where there was a domestic law power to reduce benefits during that period which had been exercised. (See the language used by the ECJ in *Smith v Avdel Systems Ltd (Case C-408/92) [1995] ICR 596* at paragraphs 17 to 18, 22 to 24 and 29 to 31; *Coloroll Pension Trustees Ltd v Russell (Case C-200/91) [1995] ICR 179* at paragraphs 32 and 36; and *Van den Akker v Stichting Shell Pensioenfonds Case (C-28/93) [ECR-I-4527]* at paragraph 17.)

In its recent decision in *Safeway v Newton [2017] EWCA Civ 1482* the Court of Appeal held that *Harland & Wolff* had been wrongly decided and that the very issue for which *Harland & Wolff* had stood as authority for so long should be referred to the ECJ for determination.

This article looks at the basis for the Court of Appeal's decision and asks whether this marks the beginning of a renaissance in failed equalisation cases, or whether it is a final flourish before the inevitable end.

WHAT HAPPENED IN SAFEWAY?

The situation that arose in *Safeway* was all too familiar: a failed attempt to change benefits by making an

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announcement to members where the governing documentation stated that a deed was required for any amendment to be effective.

The particular facts in *Safeway* were as follows:

- Under the rules of the Safeway Pension Scheme (the Scheme), the normal retirement dates (NRDs) for men and women had historically been 65 and 60 respectively.
- In response to the decision in *Barber*, the employer decided that benefits should be "levelled down" with effect from 1 December 1991, that is, that the NRD of the advantaged class (women with an NRD of 60) should be reduced to the NRD of the disadvantaged class (men with an NRD of 65).

  (Note that, while paradigmatically NRD 60 is treated as the advantageous class because it is likely to have the biggest impact on the liabilities, this is of course not necessarily so for those who would prefer to retire at a later date and continue to accrue pensionable service in the meantime.)
- The relevant amendment power of the Scheme contained a retrospective power of amendment in the following terms:

  "**Power of Alteration of Deed and Rules**

  The Principal Company may at any time and from time to time with the consent of the Trustees by Supplemental Deed executed by the Principal Company and the Trustees alter or add to any of the trusts powers and provisions of the Scheme... and may exercise such powers so as to take effect from a date specified in the Supplemental Deed which may be the date of such Deed or the date of any prior written announcement to Members of the alteration or addition or a date occurring at any reasonable time previous or subsequent to the date of such Deed so as to give the amendment or addition retrospective or future effect as the case may be."
- An announcement was issued by the employer and the trustee notifying members that both men and women would be accruing NRD 65 benefits with effect from 1 December 1991 and the Scheme was then administered on that basis.
- On 2 May 1996, a new trust deed and rules were executed as part of a general updating and consolidation process (the Amending Deed), which set out (among other changes) that NRDs for men and women were 65 with effect from 1 December 1991, being the date identified in the earlier announcement.

The announcement was not in itself sufficient to amend members' benefits with effect from 1 December 1991 under the terms of the amendment power which required a deed (*Court of Appeal decision, paragraphs 19 to 31*).

As to the Amending Deed, it was accepted by both sides that there was no domestic law or EU law restriction on the Amending Deed being effective at the very least to change NRDs to 65 for men and women from the date it was executed, that is, from 2 May 1996. The question was whether the Amending Deed was effective to change members' NRDs retrospectively with effect from 1 December 1991.

It was accepted by the representative beneficiary that the Amending Deed was effective as a matter of domestic law to make the retrospective changes to NRDs because there were no accrued rights provisos in the amendment power, and the amendment was made prior to the introduction of section 67 of the Pensions Act 1995 (brought into force with effect from 6 April 1997).

The issue was whether the Amending Deed was effective to make the retrospective changes to NRDs with effect from 1 December 1991 as a matter of EU law.

THE HARLAND & WOLFF CONUNDRUM

The problem was that such a retrospective amendment appeared to conflict with the decision in *Harland & Wolff*.

In that case, there had also been an attempt to "level down" NRDs retrospectively as permitted by the scheme's amendment power. Mr Justice Warren concluded, however, that Article 119 of the EC Treaty on the Functioning of the EU (also known as the Rome Treaty) did not permit such retrospective "levelling down", even where it was permitted as a matter of domestic law, because Article 119 required benefits to be "levelled up" during the Barber window.

That decision created a rather surprising legal result.

Prior to the Barber window, the benefits of men and women were defeasible as a matter of domestic law because they were at all times subject to retrospective change by a valid exercise of the power of amendment.

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This meant, applying it to the facts in *Safeway*, that prior to the Barber window men had defeasible NRD 65 benefits and women had defeasible NRD 60 benefits. If, however, Mr Justice Warren was right that the benefits of the advantaged class (women) could not be reduced during the Barber window despite the fact that they had always been defeasible benefits under domestic law, Article 119 had the perverse effect of, first, making the benefits of the advantaged class (women) even better than they previously were, by converting their *defeasible* NRD 60 benefits into *indefeasible* NRD 60 benefits and, secondly, in order to treat the disadvantaged class (men) equally, converting men's *defeasible* NRD 65 benefits into the *indefeasible* NRD 60 benefits that were now being enjoyed by women as a result of the operation of Article 119.

In other words, what equality under Article 119 required during the Barber window according to the decision in *Harland & Wolff* was that:

- The previously disadvantaged class (men) get a better benefit that was enjoyed by the previously advantaged class (women) because they get an *indefeasible* NRD 60 benefit whereas women previously enjoyed a *defeasible* NRD 60 benefit.

- The previously advantaged class (women) become the disadvantaged class and, by a form of ratchet effect, have their *defeasible* NRD 60 benefits improved to *indefeasible* NRD 60 benefits.

Mr Justice Warren was alive to this conundrum in *Harland & Wolff* (*paragraphs 18 to 19, Harland & Wolff decision*) but considered himself bound in reaching his conclusion by the decision in *Smith v Avdel*.

THE DECISION OF THE COURT OF APPEAL IN *SAFEWAY*

Mr Justice Warren was also the judge at first instance in *Safeway* where he affirmed his own decision in *Harland & Wolff.*

The Court of Appeal, however, took a different view and concluded that Mr Justice Warren was wrong in both cases to have considered himself bound by *Smith v Avdel*.

In doing so, the Court of Appeal approved the following propositions of EU law that were put forward on behalf of *Safeway*:

- Article 119 makes it unlawful to provide men and women with different pension benefits in relation to pensionable service undertaken after 17 May 1990 (see *Coloroll* at paragraphs 25 to 28).

- Employers and pension trustees may take effective "measures" available to them under domestic law (including the terms and rules of the relevant Scheme) to implement Article 119 by "levelling up" or "levelling down" with respect to future pensionable service (that is, service undertaken after the taking of those effective measures).

- In the period from the opening of the Barber window until the taking of those effective "measures" (generally described as the closing of the Barber window):

  - employers and trustees will be required to confer the **same rights** upon the disadvantaged class as those enjoyed by the advantaged class. (See the decision of the ECJ in *Fisscher v Voohruis Hengelo BV, Case (C-128/93) [1995] ICR 635* at paragraphs 33 to 37, *Coloroll* at paragraphs 32 to 36 and *Smith v Avdel* at paragraph 17);

  - the benchmark for ascertaining, during the period when the Barber window is open, the rights of the advantaged class is to be found by reference to the trust deed and rules of the relevant scheme, because that provides the sole and exclusive system or frame or point of reference for the purposes of achieving equal treatment. (The origins of this principle in the EU authorities are well summarised at first instance in *Safeway* by Warren J at paragraphs 35 to 41, by reference to *Razzouk and Beydoun v EC Commission (Cases 75/82 and 117/82) [1984] 3 CMLR 470*, *The Netherlands v Federatie Nederlandse Vakbeweging (Case 71/85) [1987] 3 CMLR 767* and *Nimz v Freie und Hansestadt Hamburg (Case C-184/89) [1992] 3 CMLR 699*); and

  - the objective of Article 119 during the period when the Barber window is open is concerned with "levelling up" the rights of the disadvantaged class to those enjoyed by the advantaged class, but not with giving either the advantaged class more generous rights than they previously enjoyed, still less giving the disadvantaged class more generous rights than previously enjoyed by the advantaged class.

(*Court of Appeal decision, paragraphs 37 to 40*.)

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The *Harland & Wolff* conundrum could not be said to sit well with these basic principles and it was difficult to interpret *Smith v Avdel* as authority for a proposition that cut across established principles of EU law.

The Court of Appeal also accepted Safeway's submission that, whilst on the facts as they appeared in the various reports of the case there seemed to have been an attempt to amend members' benefits retrospectively, it could not safely be said that *Smith v Avdel* was authority for the proposition that defeasible benefits could not be retrospectively reduced during the Barber window.

It was, in particular, noted that:

- There was not any analysis, either in the Industrial Tribunal which referred the case or in the ECJ itself of the terms and effect of the power of amendment in that scheme. It was only through some investigative work by Safeway's legal team that the actual amendment power in the *Smith v Avdel* case was discovered. It was apparent from the terms of that power that there were sufficient accrued rights provisos that members' benefits were not in fact defeasible, contrary to the assumption made Mr Justice Warren in *Harland & Wolff*. It could not consequently be said that *Smith v Avdel* was good authority for the proposition that benefits that are defeasible under domestic law cannot be reduced during the Barber window.

- There was no analysis of the quality of the "levelled up" benefits in *Smith v Avdel* and no consideration of whether those benefits were in fact defeasible or not. The only party with an interest in arguing that the benefits were capable of being reduced retrospectively during the Barber window was the employer and the point was not taken. This was something that was pointed out to Mr Justice Warren in *Harland & Wolff* by Nicholas Paines QC, who had in fact appeared as a junior before the ECJ in *Smith v Avdel*.

- It was far from clear that the ECJ in *Smith v Avdel* even perceived a tension between preserving indefeasible rights on the one hand, and turning defeasible rights into indefeasible rights, on the other.

COMMENT

The *Harland & Wolff* conundrum has always been a highly unsatisfactory feature of the law on equalisation, not least because it appeared to conflict with core principles of EU law.

The practical stance taken by the Court of Appeal in recognising the limits of *Smith v Avdel* as an authority in this area is to be welcomed. When one looks at *Smith v Avdel*, it is not apparent that the ECJ considered it was answering any question that was different from the basic equalisation question of what Article 119 required for different periods of service which the same panel of judges (with the exception of Judge Kakouris and Judge Edward, who appeared in *Coloroll* but not in the smaller panel for *Smith v Avdel*) answered in the judgment handed down on the same day in *Coloroll*. Indeed, every paragraph of the reasoning in the *Smith v Avdel* judgment (apart from the beginning and the conclusion) is copied and pasted straight from the judgment in *Coloroll*. It is difficult to think that the ECJ had the quality or defeasibility of members' "levelled up" benefits as a matter of domestic law in mind in reaching its decision in *Smith v Avdel*, not least because the terms of the power of amendment do not even appear to have been available to it at the time.

It might be said that the Court of Appeal could have been even more robust in recognising that the question that it has referred to the ECJ is answered by the application of the principles of EU law that it accepted in paragraphs 37 to 40 of its judgment.

It is not just that *Smith v Avdel* did not decide the point that retrospective amendments during the Barber window were impermissible, but that it could not have done so in accordance with established EU law. The point is that Article 119 operates automatically during the Barber window to give the disadvantaged class the same benefits as (not better benefits than) the advantaged class. It is not concerned with the quality of those "levelled up" benefits as set out in the trust deed and rules of the scheme as the "sole" or "exclusive" frame of reference. Once the benefits are equal by virtue of the automatic operation of Article 119, whatever the quality of those "levelled up" benefits, that provision has done its work in bringing about equality. Consequently Article 119 has nothing to say about the exercise of the retrospective power of amendment in a case like *Safeway* because it did no more than defease that which was, as a matter of domestic law, defeasible and, in doing so, it treated men and women equally.

The point is all the stronger on the facts of *Safeway* itself, where members were given a clear announcement that this would happen from 1 December 1991 and no member was able to say or

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could reasonably have said that they had been misled or were expecting anything different.

However, one can readily see why the Court of Appeal considered that the application of those principles to this situation was properly a matter of EU law which, absent authority in the form of *Smith v Avdel*, was an undecided point that was better left to the ECJ to determine.

It remains to be seen of course what sort of reception this case will be given by the ECJ in a post-Brexit environment.

IN THE EVENT THAT THE ECJ ULTIMATELY AGREES WITH SAFEWAY'S POSITION, WHAT DOES IT MEAN FOR PENSION SCHEME ADMINISTRATION?

The potential irony is that after years of "failed" equalisation cases, Safeway could trigger a new wave of "unknowingly successful" equalisation issues, that is, cases where the pension schemes have been administered wrongly on the basis that, following *Harland & Wolff*, their attempts at retrospective equalisation had been unknowingly unsuccessful.

The reality, however, is that even if Safeway is successful before the ECJ, it is highly unlikely to result in a resurgence of equalisation issues within the industry.

The main reason for this is that the outcome of *Safeway* will only affect schemes where first, there is a retrospective power of amendment without accrued rights protections such that members' benefits can properly be said to be defeasible benefits, and secondly, the retrospective power of amendment was in fact exercised between 17 May 1990 and 6 April 1997, when section 67 of the Pensions Act 1995 came into force (after the introduction of section 67, accrued rights could not be characterised as defeasible rights and so the argument being run in Safeway can no longer apply). Whilst it is expected that some schemes will fall within those parameters, such as the scheme in *Harland & Wolff* itself, most will not.

The views expressed are the authors own and not necessarily those of Practical Law.

FURTHER READING

- For judgment and case report, see *Safeway Ltd v Newton [2017] EWCA Civ 1482 (5 October 2017)* and *Legal update, Safeway v Newton: Court of Appeal refers question to ECJ regarding retrospective equalisation.*
- For other commentary on the appeal decision, see *Legal update, Pensions quarterly cases report: November 2017: Highlights: Safeway v Newton.*
- For more on the background law and links to related cases, see *Practice note, Equalisation of pension benefits following Barber: recent cases and possible further claims.*

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